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INTERNATIONAL UNION, LOCAL 2015

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 20

WINDSOR SACRAMENTO ESTATES, LLC
dba WINDSOR CARE CENTER OF
SACRAMENTO,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 2015,

Union.

Case 20-CA-196183

**RESPONSE TO NOTICE TO
SHOW CAUSE**

1. The Charging Party has already submitted two memoranda in opposition to the Motion for Summary Judgment. They are incorporated by reference herein.¹
2. Charging Party has submitted a Motion for Summary Judgment, which should be granted.
3. There are multiple reasons expressed in those oppositions why summary judgment should not be granted.

¹ Paragraph 5 of the Opposition to Windsor Sacramento Estates, LLC's Motion for Summary Judgment should be corrected to read: "The Board, however, should find a violation of the National Labor Relations Act."

4. The General Counsel's pursuit of this case seeking an Order of the Board dismissing the complaint is prohibited by the statute. The statute authorizing the powers of the General Counsel provides, in 29 U.S.C. § 153(d), in relevant part:

He [the General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of said complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

The authority given to the General Counsel is to prosecute complaints if a complaint is issued. That power to decide to prosecute is non-reviewable. *Vaca v. Sipes*, 386 U.S. 171 (1967), and *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 130 (1987). The issue before the Board is not the decision to issue a complaint, but rather whether the General Counsel has the power to prosecute a complaint and then to seek a dismissal of the same complaint that she/he authorized.

5. The word prosecute can't have the meaning ascribed to the General Counsel, which is to issue a complaint and seek dismissal of the complaint. Imagine a prosecutor issuing a criminal complaint against a defendant, only to seek, through a trial, the acquittal. Imagine a civil prosecutor issuing a civil complaint only to seek to have the court find that the defendant's conduct didn't breach any statute. Imagine the Department of Justice filing a civil complaint against an entity seeking a determination that that the party's actions are protected by statute. These illustrate that the word "prosecute" means to seek an adverse judgment.

Of course, the General Counsel has the right, subject to the approval of an Administrative Law Judge or the Board, to withdraw a complaint. See 29 C.F.R. § 102.18. There is no authority granted in the Rules and Regulations to the General Counsel to issue complaint and then to seek dismissal of the complaint before the Administrative Law Judge or the Board. Rather, the General Counsel is limited to withdrawing the complaint. The Board's Rules and Regulations confirm only the right of the General Counsel to withdraw the complaint, not to seek dismissal. See 29 C.F.R. § 101.9(b)(2) (referring to 29 C.F.R. § 102.18).

The Supreme Court addressed the limits of the power of the General Counsel when faced with the issue of whether a court may review the terms of a settlement reached by the General Counsel before evidence is presented in a hearing:

The General Counsel's unreviewable discretion to file and withdraw a complaint, in turn, logically supports a reading that he or she must also have final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins.

Food & Commercial Workers Local 23, above at 126.

The Court was clear that the General Counsel's authority is to prosecute cases and make decisions when not to prosecute. But here, where the General Counsel is prosecuting, he does not have the power to seek a dismissal of the same prosecution.

This also violates the Board's Rules because it prohibits the Charging Party from arguing against the General Counsel's position. In recent cases, the Board has reminded the parties that they cannot argue a different theory contrary to that of the General Counsel. *Coastal Marine Services*, 367 NLRB No. 58 (2019). Thus, the Board has precluded a Charging Party from resisting a motion to dismiss such as filed by the General Counsel in this case. This is a due process violation.

The Board is empowered to issue regulations. 29 U.S.C. § 156. But in doing so, it is governed by the Administrative Procedure Act. 5 U.S.C. § 553. Here, the General Counsel seeks to have the Board establish a rule through adjudication. But there is no authority to do so by issuing a phony complaint and seeking dismissal of it before the Board as a means of establishing a new rule applicable in similar cases. If it intends to issue such a rule, it must allow intervention by the public, which it has not done. Compare *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). Nor does the General Counsel or Board assert that it has invoked any powers under 5 U.S.C. § 554(e). Nor is there any Board Rule or Regulation allowing for such a procedure.

Finally, it is unethical for the General Counsel to issue a complaint that he believes is contrary to the law and unwarranted. In effect, he authorized a fraudulent complaint.

The statute provides that the Federal Rules of Civil Procedure govern “so far as practicable.” 29 U.S.C. § 160(b). A district court would, without hesitation, sanction anyone who filed a complaint in district court that he believed to be false and contrary to the law. Federal Rule of Civil Procedure 11. This is such a situation.

6. In summary, then, under the statute and the Board’s Rules and Regulations, the General Counsel has the power to withdraw a complaint, not to seek an Order of the Board dismissing the complaint. That’s a plain abuse of discretion and contrary to the statute.

7. Again, we remind the Board that we have argued that this case needs to be heard on the record. This will allow the Charging Party to establish the lack of any business justification for the arbitration provision and to establish a factual basis for the other reasons why the arbitration provision is unconscionable under state law and otherwise unlawful.

8. The Board should deny the Motions for Summary Judgment and order these matters heard by an Administrative Law Judge. Alternatively, if the General Counsel chooses to withdraw the complaint, the Rules and Regulations will govern such a request.

9. Charging Party has already referred this improper conduct on the part of the General Counsel to the Inspector General. Charging Party intends to supplement that submission with these more recent documents.

10. The Respondent has filed a Motion for Summary Judgment. It is tainted to the same degree that the General Counsel issued a complaint that he expressly does not intend to “prosecute.” The Respondent cannot obtain vindication on such a complaint.

11. Because the current General Counsel has irretrievably violated his statutory duty and tainted the process by issuing complaint and then seeking dismissal of the same complaint, he should be disqualified from further pursuit of this case, and the Board should require that an independent counsel be retained at the Board’s expense to prosecute this case. That independent counsel should decide how to proceed. Charging Party suggests that Richard Griffin, who was formerly General Counsel, or Jennifer Abruzzo, who was formerly acting General Counsel, who are both in private practice would be an appropriate person to be hired to prosecute this case.

12. The Board, however, can grant the Charging Party's Motion for Summary Judgment. That avoids the taint and violation of the statutory authority given the General Counsel. That Motion should be granted, and the appropriate remedy should issue.

Dated: July 23, 2019

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On July 23, 2019, I served the following documents in the manner described below:

RESPONSE TO NOTICE TO SHOW CAUSE

- ☒ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 23, 2019, at Alameda, California.

/s/ Karen Kempler
Karen Kempler